STATE OF MICHIGAN

IN THE SUPREME COURT

(ON APPEAL FROM THE COURT OF APPEALS)

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

SEAN HARRIS,

Defendant-Appellant

Supreme Court Docket No. 149872
Court of Appeals Docket No. 317158
Lower Court No. 13-001620-AR

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AMICUS CURIAE BRIEF OF THE POLICE OFFICERS ASSOCIATION OF MICHIGAN IN SUPPORT OF DEFENDANTS-APPELLANTS SEAN HARRIS AND NEVIN HUGHES

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STATEMENT OF THE BASIS OF JURISDICTION

Amici Police Officers Association of Michigan incorporates by reference and rely upon the Jurisdictional Statement contained in Defendant-Appellants Sean Harris' and Nevin Hughes' briefs.

STATEMENT OF QUESTIONS INVOLVED

Amici Police Officers Association of Michigan incorporates and adopts the certified questions issued by this Court in in Defendant-Appellants Sean Harris' and Nevin Hughes' briefs as accurate.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Amici Police Officers Association of Michigan accepts and adopts the facts as stated in Defendant-Appellants Sean Harris' and Nevin Hughes' briefs as accurate for this Court's decision.

I. ARGUMENT

A. STANDARD OF REVIEW

The standard of review for a trial court's decision to grant or deny a motion to dismiss all charges is an abuse of discretion. *People v Kevorkian,* 248 Mich. App 373, 383 (2001). The standard of review for Constitutional issues is *de novo*. *Harvey v Michigan*, 469 Mich. 1, 6 (2003). The standard of review for statutory interpretation is *de novo*. *People v McLaughlin,* 258 Mich. App 635, 671 (2003).

B. MICHIGAN'S DISCLOSURES BY LAW ENFORCEMENT OFFICERS ACT PROTECTS ALL COMPELLED INFORMATION

In filing this brief, the Police Officers Association of Michigan (POAM) adopts and supports the Defendant-Appellants argument set forth in their briefs.

The analysis set forth by Judge Wilder's dissent as it relates to statutory interpretation is correct. This Court has stated that, "the goal of judicial interpretation of a statute is to ascertain and to give effect to the intent of the legislature." *People v. Pasha*, 466 Mich. 378, 382 (2002) If the language of the statute is "clear and unambiguous, 'no further construction is necessary or allowed to expand what the legislature clearly intended to cover.'" *People v Davis*, 468 Mich 77, 79 citing *People v. Pasha*, Supra. (2003) This Court went on to clarify that, " [s]tated another way a court may read nothing into an unambiguous statute that is not within the manifest intent of the legislature as derived from the words of the statute itself. *Davis*, supra, citing *Roberts v. Mecosta County General Hospital*, 466 Mich. 57, 62 (2002); *Crowe v. Detroit*, 465 Mich 1, 6 (2001) .

MCL 15. 393 states that "[a]n involuntary statement made by a law enforcement officer, and any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding." MCL 15.395 states in relevant part that:

> An involuntary statement made by a law enforcement officer is a confidential communication that is not open to public inspection. The statement may be disclosed by the law enforcement agency only under 1 or more of the following circumstances:
>
> (a) With the written consent of the law enforcement officer who made the statement.
>
> (b) To a prosecuting attorney or the attorney general pursuant to a search warrant, subpoena, or court order, including an investigative subpoena issued under chapter VII A of the code of criminal procedure, 1927 PA 175, MCL 767a.1 to 767a.9. However, a prosecuting attorney or attorney general who obtains an involuntary statement under this subdivision shall not disclose the contents of the statement except to a law enforcement agency working with the prosecuting attorney or attorney general or as ordered by the court having jurisdiction over the criminal matter or, as constitutionally required, to the defendant in a criminal case.

The statutory language is clear and unambiguous. Not only is the prosecutor prohibited from having the statement, the statute states, that "**an involuntary statement made by a law enforcement officer** and **any information derived from that involuntary statement, shall not be used against the law enforcement officer in a criminal proceeding.** (Emphasis added) The People appear to ignore the first half of the sentence, which states "an involuntary statement made by a law enforcement officer" is protected. The question of whether the statement is true or false really has absolutely no bearing on this case or relevance under the Constitution or statute. The relevant inquiry is: Was the statement provided by the officers involuntary? If it was, then the statement is protected.

The US Supreme Court has long held that the question of coercion under the Fifth Amendment "is to be answered with complete disregard of whether or not [the accused] in fact spoke the truth." *Rogers v. Richmond* 365 US 534, 544 (1961). In this case, the People concede that statements at issue in this case were only provided after the officers invoked their

constitutional right to remain silent and were then subject to direct coercion and compulsion by their government employer to answer questions in an internal inquiry. Anything gained as a result of the compulsion is protected by the statute.

The lower Court's analysis regarding the meaning of the word "information" is strained and misplaced to say the least. The whole "misinformation" argument is ridiculous. The words misinformation or truthful never appear in the statute. The strained and flimsy legal argument is obviously result driven. The analysis and argument embarrasses our judicial system. This strained logic ignores the fact that, absent the officers being coerced and compelled as a condition of employment to provide the statement, there would be no information or evidence to pursue a criminal charge. The officers' version of events by any definition is information, without it there is no basis for anything.

The People's argument that MCL 15.391 *et seq.* is nothing more than a mere codification of the principles of *Garrity v. New Jersey,* 385 U.S. 493 (1967) is incorrect. In *Garrity*, the United State Supreme Court struck down as unconstitutional a New Jersey state statute that imposed severe employment sanctions on public employees who invoked their right to remain silent in criminal investigations. The Fifth Amendment privilege includes the "right to remain silent," as well as immunity from use in a criminal proceeding information which is compelled by government. *Lefkowitz v Turley*, 414 US 70, 78 (1973), citing *Kastigar v United States*, 406 US 441 (1972). The Fifth Amendment privilege against compelled self-incrimination protects an individual from being forced to give information which may later be utilized against him in a criminal proceeding. *Kastigar*, 406 US at 444. The Supreme Court noted that "[w]e have already rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need. *Lefkowitz v Cunningham,* 431 US 801 at 808(1977) citing *Lefkowitz*

v. Turley, 414 U.S. 70 at 78-79. Government has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity, Gardner v Broderick*, 392 US 273 (1968), and *Sanitation Men v Commissioner of Sanitation*, 392 UA 280 (1968), where alternative methods of promoting state aims were no more apparent than here. *Lefkowitz v Cunningham,* 431 US 801 at 808(1977). *Garrity* and its progeny made clear that coercion or compulsion on public employees, not just law enforcement officers, that impacted their ability to invoke, assert and enjoy the constitutional protections afforded all citizens of the United of States, was impermissible.

MCL 15.391 limits its application to only law enforcement officers. The Statute further restricts not only the general public's access to the statements and information, but specifically limits access of the County Prosecutors and Attorney General to the statements and information compelled from the officers. The People fail to grasp that the statute, MCL 15.391 et seq. was not only a codification of *Garrity*, it was a direct reaction to what some considered an overzealous Wayne County Prosecutors office and the Court of Appeals decision in *In Re Morton,* 258 Mich App. 507 (2003). In *Morton*, the then Garden City Police Chief refused to provide a *Garrity* protected statement pursuant to an investigative subpoena issued by the Wayne County Prosecutors office. The officers, who were represented in the *Garrity* interviews by POAM, had invoked their right to remain silent then they were ordered as a condition of employment under a threat of discipline to provide a statement and answer questions pursuant to an internal inquiry. The Wayne County Prosecutor sought the statements but the Chief refused. The Chief's fear was that if the prosecutor had access to the statements then the officers would not provide the information necessary for the department to evaluate conduct pursuant to policy and procedures.

The Court of Appeals correctly held that because, "this case deals with only the production of the statements and not their use in a criminal proceeding against the officers, the Fifth Amendment has no application here" *Supra* at 572. Despite the Court's ruling, some other police labor organizations had egg on their face for fear mongering, so they sought the current language in the statute that prohibits a prosecutor from obtaining the compelled statements absent some clearly enumerated exceptions, none of which are present in the current case. The People actually cite some propaganda articles written by some attorney who claims to have some knowledge of the law which it is hard to believe is a part of the record in this case. That propaganda contained erroneous information; as a result, the Police Officers Association of Michigan, the largest police union in Michigan, that handles hundreds of *Garrity* related interviews a year, and whose attorneys actively engage in the criminal defense of officers in courts across this state, publicly addressed the misconceptions set forth in those articles. The fundamental concern of all involved was this exact situation where an employer forces an officer to make compelled statement as a condition of employment under a threat of discipline and then somehow a prosecutor obtains the statement and then charges the officer with a crime.

The People ignore the fact that the statute specifically states that "[a]n involuntary statement shall not be used against the law enforcement officer in a criminal proceeding." It also provides that the statement made by a law enforcement officer is a confidential communication that is not open to public inspection which, pursuant to the statute, includes the prosecutor and attorney general. As stated earlier, the county prosecutor and Attorney General can only obtain the statement through, "written consent of the law enforcement officer" or "pursuant to a search warrant, subpoena or court order including an investigative subpoena." MCL 15.395(1) (2). Even if the prosecutor had obtained the statements at question in this case legally, pursuant to the

statute, which in this case they did not, they are prevented by statute to use the statement in a subsequent criminal proceeding.

The additional statutory protections, contrary to the Prosecutors assertions, do not unduly burden the prosecution or bestow any transactional immunity from prosecution upon the declarant. Officers can, and are prosecuted for criminal conduct that has also been subject to a separate internal inquiry and *Garrity* interviews. The *Garrity* interview has been separate and distinct from the criminal case investigation, and evidence other than the information provided by the officers in the *Garrity* interview, which has not been turned over to the Prosecutor is the basis of those charges. The officers are also subject to severe internal discipline based upon the information obtained.

The People incredulously state that the officers, "statements are *not* being used against them; no leads or evidence were gained from their lies." (Appellee's Brief, p. 29) If you take away the statement you have no evidence or basis for the charge. The People have never explained how allegedly lying to one's employer is tantamount to obstruction of justice. This statement that is basis for the charges was obtained by the employer in an inquiry into whether or not policy and procedures were followed, not a criminal investigation, not in court, and not under oath. The statements are being used against the officers as they are the only evidence of any alleged wrongdoing.

C. THE WAIVER ACCURATELY STATED THE LAW AND BARS SUBSEQUENT USE.

One really cannot separate the Constitutional analysis from the statutory analysis in this case. Once the officers invoke their right to remain silent and then their government employer imposes constitutionally impermissible coercion or compulsion, which is the trigger for *Garrity*

protection, the Michigan state statute makes the information confidential only to be used in internal proceeding and not subject for use in a criminal proceeding.

The People's argument that statements are allegedly lies and as such have no protection is simply not accurate, and further whether the statements are true or false is of no significance in deciding the issue at hand. Through what is being characterized as waivers, these officers were specifically told by the government, that their statements "will not and cannot be used against me in any subsequent proceeding other than disciplinary proceeding within the department itself." The waivers reiterated the Constitutional protections set forth by the US Supreme Court in *Garrity* and its progeny, as well as the Michigan legislature and Governor through the enactment of MCL 15.391 et seq. In this case, the only basis for the charge of obstruction of justice is the information, the statements, and the answers provided by the officers in the internal conducted by the department that were obtained by threatened job sanctions up to and including termination.

It is important to stress that the statements were not provided as part of a criminal investigation. The officers declined to provide a statement to the criminal investigators. After the officers declined to provide a voluntary statement, the People chose not to pursue a statement from the officers through an investigators subpoena, MCL 767A.1 *et seq*. Had the People chosen to utilize this statutorily approved mechanism, it is anticipated that the officers would have again invoked their right to remain silent, but the People could have then sought use immunity from a Circuit Court Judge, at which time the officers would have been compelled to provide a statement under oath. The officers would have been advised that pursuant to statute, MCL 767A.9:

> No testimony or other information compelled under the order, or any information directly or indirectly derived from that testimony or other information, may be used

against the person in any criminal case, ***except for impeachment purposes, in a prosecution for perjury or for other wise failing to comply with the order granting immunity.*** (emphasis Added)

The Legislature specifically addresses in the investigative subpoena statute perjury and contempt at MCL 767A.9. This section provides specific penalties for failing to comply and lying under oath. By contrast, this language is noticeably absent from the Law Enforcement Disclosure Act, in major part because statements provided under the Act are confidential and intended for internal employment purposes only that are specifically exempted from criminal proceedings.

The notice that the officers were given in the waiver simply stated the constitutional protections and prohibitions with the notice that the statements would not and could not "be used against me in any subsequent proceeding other than disciplinary proceeding within the department itself" however these waivers do not operate by themselves because of the MCL 15.391 et seq. The Michigan Legislature with the Governor's authorization intentionally and knowingly bestowed upon Law Enforcement Officers as defined in the statute greater protections for their internal statements and information compelled by their employers.

CONCLUSION AND RELIEF

MCL 15.391 *et seq*. precludes the use of any involuntary statement or information derived from such statement in a subsequent criminal proceeding and the waivers signed by the defendants are valid reservations of the applicable law, as such this Court should **REVERSE** the decision of the Court of Appeals and **REINSTATE** the circuit court's order **AFFIRMING** the district court's dismissal of the obstruction of justice charge.

Respectfully Submitted,

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